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# In the Supreme Court of the United States

October Term, 1944. ✓

ELLA HAUSER THATCHER,

Petitioner,

vs.

KATHERINE REBECCA BLACKER and TAYLOR  
B. WEIR, Executor of the Last Will and Testa-  
ment of Samuel T. Hauser, deceased,

Respondents.

PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE NINTH CIRCUIT  
and  
BRIEF IN SUPPORT THEREOF

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Filed January....., 1945.

....., Clerk.



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ment of Samuel T. Hauser, deceased,

Respondents.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

*To the Honorable the Chief Justice and Associate  
Justices of the Supreme Court of the United  
States:*

Your petitioner, Ella Hauser Thatcher, plaintiff  
and appellee below, respectfully shows:

### SUMMARY STATEMENT OF THE MATTER INVOLVED

Petitioner contends that the decision of the Cir-  
cult Court of Appeals involves an important ques-  
tion of Montana law, and is in conflict with the law  
of that state; that it is also in conflict with applic-  
able decisions of this Court, and that the mandate  
deprives her of the right to trial, guaranteed by the



Fifth Amendment to the Constitution of the United States. No question of fact is involved.

Samuel T. Hauser, a resident of Lewis and Clark County, Montana, died on November 9, 1941, leaving a holographic will made in January of that year. He left surviving him a sister, your petitioner, two nephews and four nieces. On June 27, 1942, the will was admitted to probate in the District Court of Lewis and Clark County, Montana, and Appellant Weir was appointed Executor thereof (R. 2 & 3).

In addition to the foregoing facts, petitioner's complaint (R. 2-7) alleges diversity of citizenship, the jurisdictional amount, and that decedent died intestate as to all of his property, except that named in the first sentence of paragraph entitled "Second" of the will, which reads as follows:

"Second. I give to Katherine Rebecca Blacker all household furniture, table ware pictures, silverware, & jewelery. All the rest, residue and remainder of my estate, real personal and mixed and where soever situated." (R. 7).

That is the only language in the will which refers to the disposition of any property, and the prayer of the complaint (R. 5 & 6) is for judgment that decedent died intestate as to all of his property, except that mentioned in the first sentence.

Respondents' answer denies that the testator died intestate as to any of his property (R. 12); admits all of the other material allegations of the complaint (R. 9), and affirmatively alleges certain circumstances surrounding testator's life (R. 9-12), which



are summarized in the opinion of the Circuit Court of Appeals (R. 60 & 61).

By motion for judgment on the pleadings (R. 12 & 13), petitioner contended in the District Court and in the Circuit Court of Appeals that matters affirmatively alleged in the answer are immaterial and may not be resorted to in construing a will such as is involved in this case and that evidence thereof is inadmissible. She also contended that, under the law of Montana:

1. Section 7021 of the Revised Codes of Montana of 1935, which reads as follows:

"A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will.",

prohibits enlarging the bequest "I give to Katherine Rebecca Blacker all household furniture, table ware pictures, silverware, & jewelery." to include any other property.

2. That, since the phrase, "All the rest, residue and remainder of my estate, real personal and mixed and where soever situated." contains no verb or operative word, "the rest and residue" of testator's estate is undisposed of.

3. That heirs at law cannot be disinherited by conjecture or by language which is not clear and unequivocal. In *re* McLure's Estate, 63 Mont. 536, 541, 208 Pac. 900, 902.



The motion for judgment on the pleadings was submitted upon oral argument and briefs (R. 21) and, on December 31, 1943, the District Court decided that Mr. Hauser died intestate as to all of his property except: "household furniture, table ware pictures, silverware, & jewelery." (Opn. R. 14-42), and, on January 17, 1944, entered judgment in favor of petitioner and against the respondents (R. 44).

Upon appeal by respondents, the Circuit Court of Appeals decided that the will gives decedent's entire estate to Respondent Blacker (R. 70) and, on October 18, 1944, rendered its opinion (R. 59-70), and entered a decree reversing the judgment of the District Court and remanding the case to that Court "to make findings and to enter judgment in harmony with the opinion of this court." (R. 71).

The opinion of the Circuit Court of Appeals discloses that that Court treated the matters affirmatively alleged in the answer as material and took them into consideration in construing the will (R. 60 & 70) and that it apparently gave no consideration to the other contentions of petitioner, hereinbefore set forth. They are not even referred to.

By Petition for Rehearing (R. 72) the attention of the Circuit Court of Appeals was called to the fact that it had overlooked petitioner's contentions and that, since it had decided that the matters affirmatively alleged in the answer are material, the case should be remanded to the District Court for trial of those issues, which, by Federal Rules of



Civil Procedure 7(a) and 8(d), are deemed denied. Petition for Rehearing was denied on December 2, 1944 (R. 74).

Respondent filed a motion to dismiss (R. 9) upon the ground that exclusive jurisdiction of the matter involved rests in the state court and that the complaint is insufficient, but those questions are not involved here, for the motion was denied by the District Court (R. 21-32 & 44) and that ruling sustained by the Circuit Court of Appeals (R. 61-66).

### QUESTIONS PRESENTED.

#### I.

#### CONFLICT WITH THE LAW OF MONTANA.

Whether the decision of the Circuit Court of Appeals is in conflict with Section 7021 of the Revised Codes of Montana of 1935, which reads as follows:

“A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will.”

and with the rule announced by the Supreme Court of Montana in *In re McLure's Estate*, 63 Mont. 536, 541, 208 Pac. 900, 902, wherein the court, referring to the construction of a will which would result in disinheriting heirs, said:

“Appellant's construction would take from the widow, the natural object of the testator's bounty, that which without a will the law



would have given her. Such a construction is not to be favored unless the 'intention' of the testator is so expressed in clear and unequivocal language."

## II.

### VIOLETION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND CONFLICT WITH DECISIONS OF THIS COURT.

Whether failure of the Circuit Court of Appeals to remand the case to the District Court for trial after it had decided that the affirmative allegations in the answer, which petitioner, by motion for judgment on the pleadings, claimed to be immaterial, are material, constitutes a violation of the due process clause of the Fifth Amendment to the Constitution of the United States, and is in conflict with applicable decisions of this Court. *Saunders v. Shaw*, 244 U. S. 317, 319 and *Georgia R. & Elec. Co. v. Decatur*, 295 U. S. 165, 171.

## JURISDICTION

Petitioner invokes the jurisdiction of this Court under Sec. 240 of the Judicial Code, as amended by the Act of February 13, 1925 (Title 28, Sec. 347, U. S. C. A.), and also relies on Paragraph 5(b) of Rule 38 of this Court, and upon *Erie R. Co. v. Tompkins*, 304 U. S. 64; *Meredith v. City of Winter Haven*, 320 U. S. 228 (Adv. Op., p. 6); *Saunders v. Shaw*, 244 U. S. 317, 319 and *Georgia R. & Elec. Co. v. Decatur*, 295 U. S. 165, 171.



## REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

### I.

The Circuit Court of Appeals failed to follow the rule announced in *Erie R. Co. v. Tompkins*, 304 U. S. 64, and *Meredith v. City of Winter Haven*, 320 U. S. 228, (Adv. Op., p. 6).

### II.

The questions as to the construction of the will here presented involving, as they do, property rights, are "important questions of local law" clearly within the meaning of Paragraph 5(b) of Rule 38 of this Court. As pointed out in *Sutherland, et al. v. Selling, et al.*, (C. C. A. 9), 16 Fed. (2d) 865, 868:

"It would be unfortunate indeed if the law were otherwise, because in that event there might be one rule of property for citizens of the state and a different rule for citizens of other states and aliens."

Also, if the decision of the Circuit Court of Appeals is allowed to stand, it will result in a high degree of confusion similar to that referred to by this Court in *Barber v. Pittsburg Ft. W. & C. R. Co.*, 166 U. S. 83, 109.

### III.

In failing to remand the case for trial of the issues of fact raised by the affirmative allegations of the answer, the Circuit Court of Appeals has deprived the petitioner of her right to trial of those issues, which is guaranteed by the due process clause of the Fifth Amendment to the Constitution of the



United States. In this respect the decision is in conflict with the decisions of this Court in *Saunders v. Shaw*, 244 U. S. 317, 319 and *Georgia R. & Elec. Co. v. Decatur*, 295 U. S. 165, 171.

If the decision is allowed to stand, it will tend to increase the trial of cases in the Federal Courts in Montana, upon allegations of fact when they should be disposed of upon questions of law. A plaintiff, who, in the honest belief that a case may be disposed of by motion for judgment on the pleadings, and the expense and burden of the trial to the parties and the Court thus avoided, will be faced with the hazard of being denied his right to trial if the motion is denied.

By its mandate the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervision. (Par. 5(b) of Rule 38 of this Court).

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals in the case numbered and entitled on its docket, No. 10707, Katherine Rebecca Blacker and Taylor B. Weir, Executrix of the Last Will and Testament of Samuel T. Hauser, Deceased, Appellants, vs. Ella Hauser Thatcher, Appellee, to the end that this cause may be reviewed



and determined by this Court as provided by the statutes of the United States; that the judgment of said Circuit Court of Appeals be reversed by this Court, and for such other and further relief as may be proper.

Dated, Helena, Montana, January 13, 1945.

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*Of Counsel for Petitioner.*

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#### CERTIFICATE OF COUNSEL

I hereby certify that I am one of the petitioner's attorneys in the above-entitled cause and that, in my judgment, the foregoing petition is well founded in law and fact, and that said petition is not interposed for delay.

Dated, Helena, Montana, January 13, 1945.

M. S. GUNN,  
Attorney for Petitioner,  
Ella Hauser Thatcher.

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The Honorable A. H. Angstman, one of Petitioner's attorneys below, having been elected to the Supreme Court of Montana, and having, since the denial of the Petition for Rehearing, assumed his seat as an Associate Justice on that Court, takes no part in this petition.